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Supreme Court, U.S.
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No. 91-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DORIS STAMEY,
Petitioner,
v.
SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in a case under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, where back pay and liquidated damages consistent with a jury's verdict have been awarded to the plaintiff, liquidated damages must continue to accrue during the pendency of an appeal concerning the appropriate form of prospective equitable relief?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Doris Stamey as Plaintiff and Appellant, and Respondent Southern Bell Telephone and Telegraph Company as Defendant and Appellee.[1]

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1 Pursuant to Supreme Court Rule 29.1, Respondent states that the following list contains the names of all corporations in which outside persons or investors might have an interest that are related as a parent, subsidiary or affiliate of Southern Bell Telephone and Telegraph Company: BellSouth Corporation, BellSouth Capital Funding Corporation, BellSouth Capital Funding - Australia, Ltd., BellSouth D.C., Inc., South Central Bell Telephone Company, BellSouth Services Incorporated, BellSouth Products, Inc., Bell Communications Research, Inc., Commtel, Inc., BellSouth Business Systems, Inc., BellSouth Communications, Inc., BellSouth Enterprises, Inc., BellSouth Advertising & Publishing Corporation, BellSouth Marketing Programs, Inc., Graphics Holding Company, Stevens Graphics, Inc., Graphic Data Systems, Inc., Oxmoor Press, Inc., Ruralist Press, Inc., PrintSouth, Inc., L. M. Berry and Company, BellSouth Direct Marketing, Inc., BellSouth Marketing Services, Inc., Berry Network, Inc., ITT World Directories, Inc., ITT World Directories (U.K.) Ltd., L. M. Berry and Company - Directories-America, L. M. Berry Services, Inc., Promedia B.V., U. S. Impressions, Inc., TechSouth, Inc., BellSouth Communication Systems, Inc., U.C.S., Inc., BellSouth Networks, Inc., Dataserv, Inc., Dataserv Computer Maintenance, Inc., Dataserv Financial Services, Inc., Dataserv International, Inc., Dataserv Limited, Dataserv (Holding) Limited, Dataserv (Leasing) Limited, BellSouth Limited, Dataserv (Finance) Limited, Dataserv System Solutions Limited, Premier Computers Limited, Dataserv Finance & Leasing Limited, Dataserv Computer Maintenance (Holdings) Limited, Dataserv Computer Maintenance Limited, Faxlease Limited, Fenchurch Industrial Supply Company Limited, Dataserv S.A.R.L., Dataserv Equipment GmbH, Dataserv S.p.A., Dataserv AG (West German Company), Dataserv AG (Swiss company), Dataserv Ges.mbH, Dataserv Premier Limited, Dataserv Espana, S.A., Premier Computers (Benelux) S.A., Dataserv Inc. Scandinavia AB, Dataserv Inc. Scandinavia ApS, Dataserv B.V., Dataserv Computer Maintenance B.V., BellSouth Advanced Networks, Inc., BellSouth Information Networks, Inc., BellSouth Argentina S.A., BellSouth Australia, Ltd., BellSouth Australia Pty. Limited, Austas Communications Pty. Ltd., Austas (NSW) Pty. Ltd., Austas (Qld.) Pty. Ltd., Austas Holdings Pty. Ltd., Austas Pty. Ltd., Capital Paging (NSW)

Pty. Ltd., Instapage Pty. Limited, Instapage Operations Pty. Ltd., SkyPage Pty. Limited, UTAS Pty. Ltd., Voice Paging Systems (W.A.) Pty. Ltd., Advanced Communications Australasia Unit Trust, BellSouth Australian Communications Enterprises, Inc., BellSouth Brazil, Inc., Movicell S.A., Movicom S.A., Telcell S.A., BellSouth International, Inc., BellSouth Argentina S.A., BellSouth International (Asia/Pacific), Inc., TCIL BellSouth Limited, BellSouth International Limited, Air Call Communications (Holdings) Limited, Air Call Answerline Limited, Air Call Cellular Limited, Air Call Inbound Limited, Air Call International BV, Air Call Skandanaviska AB, Inter-Team Societe de Services SA, Permatel SA, Air Call Paging Limited, Air Call Sites Limited, Cellular Radio Limited, Cellular Radio (London) Limited, Media Communications Limited, Selective Audio Messages Limited, BellSouth International U.K. Trustee Limited, BellSouth Inversora S.A., B.A. Celular Inversora S.A., Compania de Radiocomunicaciones, Moviles S.A., BellSouth New Zealand Limited, BellSouth Puerto Rico, Inc., BSI Denmark, Inc., Compagnie Financiere pour le Radiotelephone S.A., Datech S.A. TelSouth Limited, BellSouth Mexico, Inc., ComCell, S.A. de C.V., Comunicaciones Celulares de Occidente, S.A. de C. V., BellSouth Mexico, S.A. de C.V., BellSouth Personal Communications Limited, PCN One Limited, BellSouth Shanghai Centre, Ltd., BellSouth Venezuela, S.A., BellSouth Ventures Corporation, Marketing Communications Networks, Inc., BellSouth New Zealand Limited, BLS Denmark, Inc., Communication-Developpement S.A., Raynet International, Inc., ROU Celular Inversora S.A., Abiatar S.A., TechTime, Inc., TelCel Celular C.A., T. U. International, Inc., Cidcom S.A., BellSouth Cellular Corp., BellSouth Cellular Holdings, Inc., American Cellular Communications Corporation, ACC of Appleton, Inc., ACC of Green Bay, Inc., Green Bay Cellular Telephone Company, ACC of Kenosha, Inc., Kenosha Celltelco Partnership, ACC of Madison, Inc., Madison Cellular Telephone Company, ACC of Muncie, Inc., Muncie Cellular Telephone Company, Inc., ACC of Rockford, Inc., National Cellular Communications, Inc., ACC of Terre-Haute, Inc., Terre-Haute Cellular Telephone Company, Inc., ACC of the Southwest, Inc., Kokomo Celltelco Partnership, Anderson Cellular Services, Inc., Anderson Cellular Partnership, Anniston-Westel Company, Inc., Gulf Coast Cellular Telephone Company, Bakersfield Holdings, Inc., Bakersfield Cellular Telephone Company, Bloomington Cellular Services, Inc., Bloomington Cellular Telephone Company, Charisma Communications Corp. of the Southwest, Houston Mobile Cellular Communications Company, Houston Cellular Telephone Company, Galveston Mobile Corporation, Gary Cellular Corporation, Gary Cellular Telephone Company, Hawaii Cellular Corporation, Honolulu Cellular Telephone Company, Houston Cellular Corporation, Houston Mobile Cellular Communications Company, Cellular Systems,

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Houston Cellular Telephone Company, Jackson Holdings, Inc., Jackson Cellular Corporation, MCTA, Janesville/Beloit Cellular, Inc., Janesville Cellular Telephone Company, Inc., Lafayette, Indiana Cellular Services, Inc., Los Angeles RCCs, Inc., Los Angeles Cellular Corporation, Los Angeles Cellular Telephone Company, Racine Cellular, Inc., Racine Cellular Telephone Company, Rochester Cellular Corporation, RSA 716 Cellular, Inc., Sheboygan Cellular Services, Inc., Sheboygan Cellular Telephone Company, Inc., Westel-Indianapolis Company, Indianapolis Telephone Company, Westel-Los Angeles Company, Westel-Milwaukee Company, Inc., Milwaukee Telephone Company, Westel Richmond, Inc., Richmond Cellular Telephone Company, Richmond Cellular Telephone Company - Cellular One, BellSouth Mobility Inc., Alabama Cellular Service, Inc., Baton Rouge CGSA, Inc., Chattanooga CGSA, Inc., Florida Cellular Service, Inc., Georgia Cellular Service, Inc., Georgia Cellular Holdings, Inc., Kentucky CGSA, Inc., LaFayette CGSA, Inc., Memphis CGSA, Inc., Nashville/Clarksville CGSA, Inc., New Orleans CGSA, Inc., Orlando CGSA, Inc., South Carolina Cellular Service, Inc., Graphic Scanning Corp., Mobile Communications Corporation of America, BellSouth Cellular Holdings, Inc., Bryan Industrial Electronics, Inc., MCCA Site Management, Inc., MobileComm, Inc., MobileComm Nationwide Messaging, Inc., MobileComm of Alabama, Inc., MobileComm of Baton Rouge, Inc., MobileComm of California, Inc., MobileComm of Chicago, Inc., MobileComm of Florida, Inc., MobileComm of Georgia, Inc., MobileComm of Indianapolis, Inc., MobileComm of Massachusetts, Inc., MobileComm of Memphis, Inc., MobileComm of Merrillville, Inc., MobileComm of Mississippi, Inc., MobileComm of Nashville, Inc., MobileComm of New Mexico, Inc., MobileComm of Ohio, Inc., MobileComm of Pennsylvania, Inc., MobileComm of San Antonio, Inc., MobileComm of South Bend, Inc., MobileComm of the Southwest, Inc., MobileComm of Tennessee, Inc., MobileComm of Virginia, Inc., MobileComm of Wisconsin, Inc., Network Paging Corporation, Radio & Electronic Service Company, Inc., Skilldex, Inc., Telpage of Tennessee, Inc., BLS Acquisition Corp. I, Inc. of Georgia, BellSouth Financial Services Corporation, BellSouth Information Systems, Inc. (BIS), BellSouth Resources, Inc., Sunlink Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Southern Bell Telephone and Telegraph Company respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the April 10, 1991 opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioner Doris Stamey filed her complaint against her former employer, Southern Bell Telephone and Telegraph Company ("Southern Bell" or "the Company"), in the United States District Court for the Northern District of Georgia, Atlanta Division, on December 6, 1983. In her complaint, Stamey alleged that Southern Bell had discriminated against her in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et. seq.* (the "ADEA" or "Act"), by denying her

a promotion from a non-management position to a management position, by providing her with less compensation than younger employees assigned to management titles, and by terminating her employment in retaliation for having filed a charge of employment discrimination against the Company in 1981.

Trial commenced on August 16, 1985. At the conclusion of Stamey's case in chief, Southern Bell moved for a directed verdict on all counts. The District Court granted the motion as to the promotion count because Stamey was unable to establish that any promotion at issue had occurred during the 180-day period that preceded the filing of her EEOC charge. The jury returned individual verdicts against Southern Bell on all remaining counts, awarding Stamey back pay damages in the amount of $72,896.00 for the period ending with the date of the verdict. The District Court entered judgment consistent with that verdict on August 23, 1985.

On September 3, 1985, Southern Bell filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. By order dated March 28, 1986, the District Court denied Southern Bell's motion. In the same order, the District Court directed the parties to submit briefs concerning the outstanding issue of liquidated damages as well as Stamey's request for an award of front pay and other equitable relief.

By order dated June 23, 1986, the District Court, *inter alia*, awarded liquidated damages to Stamey in an amount equivalent to the back pay award and denied Stamey's request for front pay, directing Southern Bell to reinstate Stamey. Prior to the June 23 order, Southern Bell had indicated to Stamey its willingness to reinstate her to a

position comparable to that which she had previously held. After the District Court's June 23 order, Southern Bell reaffirmed to Stamey that its unconditional offer remained open.

Thereafter, the parties filed and exchanged a number of motions and memoranda concerning the remaining matters of relief. In an order dated March 24, 1987, the District Court affirmed its earlier ruling that reinstatement as opposed to front pay was appropriate and held that since Stamey had refused Southern Bell's unconditional offer of reinstatement, Southern Bell's back pay liability was tolled as of July 23, 1986.

Subsequently, on May 28, 1987, the District Court entered an amended judgment reflecting the jury's original verdict and embodying all post-verdict relief, including prejudgment interest on the back pay award through July 23, 1986, and attorney's fees in the total amount of $85,810.00. In the amended judgment the court also directed that back pay should be calculated using a management level pay scale from the date of the verdict through July 23, 1986.

Both parties subsequently appealed. On November 4, 1988, the Eleventh Circuit affirmed the judgment for Stamey, also holding that the District Court erred in directing a verdict on Stamey's promotion claim. The Court of Appeals remanded the case "to the District Judge to determine whether Stamey at this point deserves reinstatement as a Chief Service Advisor or whether monetary damages are sufficient." *Stamey v. Southern Bell Telephone and Telegraph Co.*, 859 F.2d 855, 858-59 (11th Cir. 1988), *cert. denied*, 490 U.S. 1116 (1989).

Thereafter, Southern Bell moved for rehearing en banc, pointing out that the Court of Appeals had simply "found" that Southern Bell had discriminatorily denied Stamey a promotion even though Southern Bell had not had any opportunity to present evidence with respect to the promotion claim, as the District Court had directed the verdict at the close of Stamey's case in chief. Following the denial of that motion, Southern Bell filed a petition for a writ of certiorari with this Court in April, 1989. That application was denied on June 12, 1989.

Prior to the denial of certiorari, Stamey filed a motion to determine the remaining matters of relief on remand. The District Court issued its final ruling on that motion on May 24, 1990, finding that monetary damages rather than reinstatement were appropriate and awarding Stamey $121,199.00 in front pay, plus interest, on her failure to promote claim. This award represented the amount Stamey would have received had she worked for Southern Bell in a management level capacity through her sixty-fifth birthday, less $37,100.00 in pension benefits already paid to Stamey by Southern Bell. In addition to the back pay, liquidated damages, and prejudgment interest thereon which the court had previously awarded to Stamey, the District Court also awarded post-judgment interest in the total amount of $28,555.98 on her previous liquidated damage award. Southern Bell paid Plaintiff all the damages awarded by the District Court.

Subsequently, in June, 1990, Stamey appealed from the judgment entered by the District Court, arguing, *inter alia*, that the District Court erred in rejecting her claim that she should be awarded liquidated damages not only on the back pay award of $72,896.00 but also on the $121,199.00 award of front pay on her failure to promote

claim. On April 10, 1991, a panel of the Eleventh Circuit, including one judge who had sat on the panel which had earlier remanded the case to the District Court, affirmed the District Court's judgment in a per curiam opinion. Following the denial of Stamey's petition for rehearing and suggestion of rehearing en banc, Stamey filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner Stamey suggests that a writ of certiorari should be issued in this case because the case raises "a pretty basic question about the ADEA remedy scheme that has never been directly addressed." Petition for Writ, Page 6. Stamey frames the question as: "Where there has been a jury verdict in favor of an aggrieved employee which found a willful violation of the ADEA, should back pay and liquidated damages continue until a legally acceptable award of equitable relief has been made?" *Id.* Southern Bell agrees with Stamey that this question has not been directly addressed in the way that Petitioner frames it, although decisions where plaintiffs sought but were denied liquidated damages on front pay, which is essentially what Petitioner seeks,[2] are numerous. *See, e.g., Cooper v.*

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2 As indicated *supra* in the Statement of the Case, Stamey was awarded back pay and liquidated damages through July 23, 1986, the date she declined Southern Bell's offer of reinstatement — a date nearly one year after the jury returned its verdict in this case, and nearly one month after the District Court's determination that reinstatement rather than front pay was appropriate. On remand, following the Eleventh Circuit's holding that Stamey's rejection of Southern Bell's offer of reinstatement was not unreasonable, the District Court awarded front pay from the July 23, 1986 date forward. Stamey argues that because the award of front pay was not actually entered by the District Court until May 24, 1990, the front pay was magically transformed by the mere passage of time into back pay, thus entitling her to liquidated damages. Although Stamey attempts to avoid the rule prohibiting the liquidating of front pay awards by focusing on the date the award was

Asplundh Tree Expert Co., 836 F.2d 1544, 1557 (10th Cir. 1988) ("We conclude that the statute does not contemplate the doubling of front pay awards as liquidated damages in cases of willful violations."); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987) (reversing liquidated damage award on front pay), *cert. denied*, 484 U.S. 1047 (1988). Southern Bell further suggests that Petitioner's question would have been directly considered by other courts and thus produced a greater body of case law if it had not already been adequately answered by existing case law. The question simply is not of such significance as to require this Court's attention. If such were the case, similar claims would have been presented to a number of lower courts, providing this Court with the benefit of the analyses of those lower courts to assist it in evaluating Stamey's claim. Such analyses could be quite valuable. As Justice Stevens has stated, "experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

But such is not the case. There is no substantial conflict of authority on the issue which the Court needs to address. Those courts which, in their rulings on ADEA

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actually entered, the proper focus should be not on the date of the court order but upon the compensatory purposes of the award, as discussed in more detail *infra*. Accordingly, Stamey's claim is in fact for an award of liquidated damages upon the front pay which she has already received.

damages, have indirectly addressed the issue as framed by Petitioner, have generally been consistent in their conclusions that back pay, upon which liquidated damages may be awarded — as they have been in this case — terminates at the time of trial. *See, e.g., Bruno v. W. B. Saunders Co.*, 882 F.2d 760, 772 (3d Cir. 1989) (eliminating liquidated damages on front pay award and rejecting plaintiff's argument that the division of lost wages into back pay and front pay was "largely a matter of fortuity" depending on the course of litigation), *cert. denied*, 110 S. Ct. 880 (1990); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 373 (3d Cir. 1987) ("The relevant time period for calculating an award of back pay begins with wrongful termination and ends at the time of trial." (citations omitted)); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198 (7th Cir. 1989) (refusing to order more front pay to an ADEA claimant than an amount that would make him whole); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348, 1349 (9th Cir. 1987) (reversing liquidated damage award and stating that under the ADEA "a violating employer is liable for wages and benefits from the date of the wrongful termination *until the date of trial*, as well as 'an additional equal amount as liquidated damages' if the violation was willful," and instructing that on remand, "the jury should be instructed to award as liquidated damages, if it determines such an award appropriate, an amount not to exceed the backpay and benefits awarded" (quoting 29 U.S.C. §§216(b), 626(b)) (emphasis supplied)), *cert. denied*, 484 U.S. 1047 (1988); *Chace v. Champion Spark Plug Co.*, 732 F. Supp. 605 (D.Md. 1990) (awarding front pay and not back pay to plaintiffs beginning with the time of trial even though judgment was not entered for the plaintiffs until some four months later); *Fortino v. Quasar Co.*, 751 F. Supp. 1306, 1313, 1317 (N.D. Ill. 1990) (specifically delineating

back pay as "lost benefits and salary *prior* to trial" and stating: "Defendant correctly argues that the court should not consider front pay as a component of the 'amounts owing' under [29 U.S.C.] § 626(b) in calculating liquidated damages, because the reference to reinstatement in the statute follows the reference to 'amounts owing' and front pay is a prospective remedy" (emphasis supplied)); *Watlington v. University of Puerto Rico*, 751 F. Supp. 318, 330 (D.P.R. 1990) ("The damages [in an ADEA case] begin to run from the date the plaintiff was unlawfully refused employment until the date the jury returns the verdict"); *Pudge v. Fruehauf Corp.*, 690 F. Supp. 692, 695 (N.D. Ill. 1988) (rejecting plaintiff's contention that he was entitled to damages in addition to the back pay awarded by the jury because of the long delay before the case reached trial, and stating that the "delay cannot fairly be attributed to Fruehauf or provide a basis for an additional award of damages, however labeled"); *Endres v. Helms*, 617 F. Supp. 1260, 1268 n. 21 (D. D.C. 1985) ("The term front pay refers to an award of damages in lieu of reinstatement for the period after trial.").

Cases cited by Plaintiff are inapposite and do not represent a conflict in the law. Both *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), and *EEOC v. Enterprise Associated Steamfitters Local No. 638*, 542 F.2d 579 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), are Title VII cases in which liquidated damages were not at issue. *Patterson* was a class action in which the district court had authorized plaintiffs to "bump" other employees as a part of the remedy for the discrimination plaintiffs had suffered. The Fourth Circuit rejected this "bumping" plan and recommended instead that back pay be awarded until the date upon which the

plaintiffs were actually promoted. Absent such an award, the wronged plaintiffs would not have been made whole; they would have remained in lower-paying jobs while continuing to await the opportunity to begin working in the higher paying jobs from which they had been wrongfully denied entry. *Enterprise Associated Steamfitters* presents a similar situation in that plaintiffs had been discriminatorily denied union membership and the hiring referrals which accompanied such membership. The district court entered an injunction prohibiting the discriminatory practices of the union and awarded back pay to plaintiffs up until the date the injunction was entered. In holding that it should be the date of the actual remedying of the discrimination rather than the date of the court's injunctive order that should govern the determination of back pay, the Second Circuit pointed out that the injunctive relief did not provide for immediate union membership for all identifiable victims of past discrimination, much less immediate job placement for such victims. 542 F.2d at 590. In other words, under the district court's order, the *Enterprise Associated Steamfitters* class members, like those in *Patterson*, would continue to suffer the adverse economic effects of the discrimination against them while awaiting entry into the positions which they had been discriminatorily denied.

Such is not the case with Stamey. Under the terms of the District Court's order, she has been fully compensated at the payment scale to which the wrongfully denied promotion would have entitled her through the date of her sixty-fifth birthday. Additionally, she has recovered $72,896.00 in liquidated damages, plus interest. Surely Petitioner has been made whole, in accordance with the mandate of *Albemarle Paper Co. v. Moody*, 422 U.S. 405

(1975). The concerns which motivated the Fourth and Second Circuits to extend back pay liability in Title VII cases where liquidated damages were not even at issue are simply not present in the instant case.

These are other reasons why Stamey's petition for a writ should be denied. A ruling clarifying the answer to the question framed by Stamey would affect only a very limited number of litigants. Such a ruling by this Court would affect only ADEA plaintiffs who are not only successful in proving discrimination but who also prove willful violations of the Act and who are thereafter awarded prospective equitable relief and who then engage in protracted litigation regarding that equitable relief. As such, a ruling by this Court would have only very limited impact.

There is no need, under these circumstances, to upset a ruling which is correct as it now stands. Petitioner has been awarded back pay at a management level, liquidated damages, and interest through the date she declined Southern Bell's offer of reinstatement. She has been awarded front pay in lieu of reinstatement from that date through her sixty-fifth birthday. Petitioner has surely been made whole. Yet Petitioner now seeks to shift the focus in determining employment discrimination remedies from the "make whole" purposes inherent in employment discrimination statutes and repeatedly espoused by this Court to a mechanistic formula by which she will recover far more than she would have received had the discrimination never occurred. "If an employer's payment would not have been made had the employee continued working, it exceeds the damages necessary to make the plaintiff whole, and . . . would necessarily lead to a windfall."

Fariss v. Lynchburg Foundry, 769 F.2d 958, 966 (4th Cir. 1985).

Not only has Stamey been made whole, but Southern Bell has been punished for its willful violation of the ADEA by the District Court's award of $72,896.00 in liquidated damages. But Stamey now endeavors to punish Southern Bell even further by seeking an award of liquidated damages from the date she turned down Southern Bell's offer of reinstatement — an offer entirely consistent with the order of the District Court as it then stood — until "an appropriate award of equitable relief has been made on remand." Stamey's Petition for Writ, Questions Presented. In other words, Petitioner seeks to punish Southern Bell for its compliance with the court order subsequently held to be erroneous, and for invoking its rights to access to the judicial processes. Stamey herself states that the rule she seeks would permit an employer to litigate issues of equitable relief only at its peril. *Id.* at 7.

Liquidated damages such as Stamey here seeks are indeed authorized by the ADEA in the case of willful violations. 29 U.S.C. §626(b). These liquidated damages are punitive in nature as this Court has made clear. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). But the punishment is to be exacted in retribution for the employer's discriminatory conduct, not for the employer's exercise of its right to have matters relating to any alleged discrimination tried by a judicial tribunal. Punishment for this exercise is precisely the effect which Stamey's urged result would have. Such a result would run contrary to our justice system's most fundamental concepts of due process; it would unfairly penalize an employer for the exercise of its rights to judicial processes. The characterization of relief granted and the punishment exacted from an

employer cannot, at least absent allegations of bad faith in the conduct of litigation,[3] reasonably depend on whether an employer — or for that matter, a former employee — chooses to pursue litigation. The proper deterrent purposes of liquidated damages would not be thereby served; they were never intended to serve as a deterrent to the good faith pursuit of judicial determinations of disputed matters.

Further, Stamey's proposed resolution of this issue would encourage plaintiffs to appeal damage awards in the hope of doubling their eventual recoveries. Plaintiffs who have already won the liability phases of their cases might often be willing to accept a further delay in resolution in anticipation of a possible 100% gain in the monetary awards they may eventually receive. A consequence such as this, which would only result in windfalls to ADEA plaintiffs who have already been made whole by awards of back pay and front pay, and interest, and in the further crowding of the already crowded appellate court dockets, was surely never contemplated by the enactors of the ADEA.

The district court held that "Plaintiff's efforts to double the monetary award [i.e., the award in lieu of reinstatement] simply by classifying it as back pay are fruitless. . . . Simply by naming the [equitable] award 'back pay' Plaintiff seeks to double the remedy already deemed appropriate by this Court." District Court Order of May 24, 1990, reproduced in Stamey's Petition for Writ, Appendix C. Peti-

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3 There have been no allegations of bad faith in the conduct of litigation in the case at bar; in fact, any implicit allegations were specifically disclaimed in Stamey's Brief on Appeal to the Eleventh Circuit (p. 19).

tioner would have this Court believe that the characterization of the remedy as front pay or back pay is a function of the *time* the payment is made, not *what* the payment is made for. Petitioner is surely wrong, as both the District Court and the Eleventh Circuit have held. The time at which a payment is made has no logical connection to whether the underlying remedy is front pay or back pay. To the extent Petitioner did not enjoy the use of her money during the appellate process, the trial court awarded interest. Interest is the penalty for failure of Southern Bell to pay the front pay amount "on time."

Moreover, there is nothing in Southern Bell's conduct with regard to Stamey to remove this case from the rule espoused by this Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982), that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." Although *Ford Motor Co.* was a Title VII case, its principles have been routinely applied in ADEA cases, and are equally applicable here. *See, e.g., Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986); *Watlington v. University of Puerto Rico*, 751 F. Supp. 318 (D.P.R. 1990). While Southern Bell does not argue that under these circumstances the accrual of *all* of Stamey's damages was tolled at the point at which Stamey declined Southern Bell's offer of reinstatement, the Company submits that the District Court correctly decided that *backpay* liability, upon which liquidated damages may be awarded, was indeed tolled at that time.

In anticipating and subsequently interpreting and applying the rule of *Ford Motor Co.*, lower courts have generally required that in order to toll the accrual of back pay liability, an offer of reinstatement must be bona fide,

made in good faith. *See, e.g., Coates v. National Cash Register Co.*, 433 F. Supp. 655 (W.D. Va. 1977); *Loubrido v. Hull Dobbs Co.*, 526 F. Supp. 1055 (D.P.R. 1981). In cases where back pay liability has continued to accrue following the rejection of an offer of reinstatement, although sometimes couched in terms of whether the plaintiff's rejection of the offer was "reasonable," there have usually been findings, explicit or implicit, that the employer's offer in some respect was not bona fide. *See, e.g., Cooper v. Asplundh Tree Experts*, 836 F.2d 1544 (10th Cir. 1988) (back pay not tolled for several reasons, including that offer was for a position lower than the one plaintiff had previously held); *Coates v. National Cash Register*, 433 F. Supp. at 655 (back pay not tolled where reinstatement offers required transfer to undesirable locations and in some instances were for jobs that did not in fact actually exist); *Loubrido v. Hull Dobbs Co.*, 526 F. Supp. at 1058 (backpay not tolled where "the offer of reemployment made by defendant was not a bona fide one"); *Johnson v. Ryder Truck Lines, Inc.*, 30 Fair Emp. Prac. Cas. (BNA) 659 (W.D.N.C. 1980) (backpay not tolled where plaintiffs were told, in an effort to discourage them from accepting offers, that the offered jobs might soon require transfer to another location with layoff as the alternative). *Cf. Giandonato v. Sybron Corp.*, 804 F.2d at 125 (back pay tolled by rejection of offer where "The record further fails to establish that the offers of reinstatement . . . were anything other than bona fide unconditional offers of reinstatement."); *Figgs v. Quick Fill Corp.*, 766 F.2d 901, 904 (5th Cir. 1985) (backpay tolled where "Figgs' contention on appeal that this offer was not bona fide and was conditioned on Figgs agreeing to drop her discrimination claim are not supported by the record"); *Fiedler v. Indianhead Truck Line Inc.*, 670 F.2d 806 (8th Cir. 1982) (back pay tolled where there was no

evidence that offer rejected by plaintiff was not made in good faith).

Southern Bell offered to reinstate Stamey to a position comparable to that which she had previously held. This offer was entirely consonant with the District Court's order following the trial of the case. Although Southern Bell did not offer to promote Stamey to a management position, the District Court had directed a verdict for Southern Bell on Stamey's failure to promote claim. The offer did not require Stamey to relocate or to accept a lower paying position. It did not require that she compromise her claim against the Company. It is evident that such an unconditional offer, in full compliance with the District Court's order, was bona fide. The doctrine of *Ford Motor Co.* does not require that an employer offer to place an individual in a *better* position than he or she would have occupied absent discrimination; in fact, *Ford Motor Co.* held that an unconditional offer of reinstatement *without* the accompaniment of all perquisites — in that case, retroactive seniority — was sufficient to toll the accrual of back pay. The offer made to Stamey in the instant case was comparable. Although the Court of Appeals subsequently held that Stamey's rejection of the offer was "not unreasonable," it made no suggestion that Southern Bell's offer was less than bona fide.

Nor are there any "special circumstances" here present such as this Court in *Ford Motor Co.* suggested might merit an exception to the rule. In that case, the Court indicated by way of example that such an exception might be warranted where the plaintiff had been forced to relocate a significant distance at considerable cost to find a replacement job. No such factors are present in the instant case.

Under these circumstances, there is no reason for the case to be excepted from the *Ford Motor Co.* rule that back pay liability, and, accordingly, liability for liquidated damages, ceases to accrue upon the rejection of an unconditional offer of reinstatement.

CONCLUSION

Because the rulings of the District Court and the Eleventh Circuit Court of Appeals are correct, because there is no substantial split of authority on the question, and because the issue is one which is not likely often to recur, certiorari should be denied. Accordingly, Southern Bell respectfully requests that this Court deny the Petition for a Writ of Certiorari.

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Respectfully submitted,

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